

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

75-1323

B
PJS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA : Docket No. 75-1323
Appellee :
-against- :
WYADEL EDMONDS :
Appellant :
-----X

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

W. KIRKLAND TAYLOR
Attorney for Appellant
35 West 125th Street
New York, New York 10027
Tel. 212-860-9292

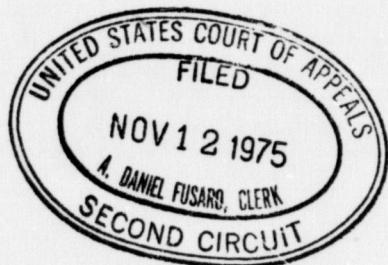


TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
TABLE OF CASES	ii
PRELIMINARY STATEMENT	iii
STATEMENT OF FACTS	1
ARGUMENT	
POINT I	
REQUIREMENT FOR DISCLOSURE OF INFORMANT'S IDENTITY	10
POINT II	
INFORMANT'S RELIABILITY AND PROBABLE CAUSE	17
POINT III	
ARREST FOLLOWED BY SEIZURE OF SUITCASE AND SUBSEQUENT SEARCH THEREOF WITHOUT A WARRANT ...	21
POINT IV	
REQUIREMENT OF REASSIGNMENT ..	24
POINT V	
TOTALITY OF DUE PROCESS	26
CONCLUSION	29

QUESTIONS PRESENTED

1. WAS IT ERROR FOR THE TRIAL COURT NOT TO ORDER THE GOVERNMENT TO DISCLOSE THE IDENTITY OF THE INFORMANT WHEN DEFENDANT CLAIMED THAT THE PERSON WHOM HE BELIEVED TO BE THE INFORMANT WAS HIS EX-WIFE OR HER HUSBAND, AND THAT SHE HAD SUPPLIED THE CONTRABAND TO "FRAME" THE DEFENDANT?
2. WAS HIS ERROR FOR THE TRIAL COURT TO DENY DEFENDANT'S REQUEST FOR A LIST OF CASES IN WHICH THE INFORMANT HAD PREVIOUSLY SUPPLIED THE GOVERNMENT WITH LEADS WHEN DEFENDANT CHALLENGED INFORMANT'S RELIABILITY AND/OR LACK OF PROBABLE CAUSE?
3. WAS IT ERROR FOR THE TRIAL COURT TO DENY A MOTION TO SURPRESS EVIDENCE ON THE GROUNDS OF AN ILLEGAL ARREST AND A SUBSEQUENT ILLEGAL SEARCH AND SEIZURE?
4. SHOULD APPELLANT HAVE BEEN ASSIGNED A NEW JUDGE AT HIS SECOND TRIAL?
5. WAS DEFENDANT DENIED A FAIR TRIAL IN TOTALITY:
 - (a) THE DEFENDANT WAS DENIED THE IDENTITY OF THE INFORMANT
 - (b) ADJOURNMENT OF TRIAL UNTIL DEFENDANT WAS IN A MENTALLY FIT STATE TO PARTICIPATE AND ASSIST IN HIS DEFENSE, WAS DENIED
 - (c) COUNSEL WAS APPARENTLY PURPOSELY MISLEAD BY FALSE STATEMENT OF GOVERNMENT DETECTIVE
 - (d) COUNSEL FAILED TO CALL DEFENDANT'S EX-WIFE, OR HER HUSBAND, WHOM DEFENDANT ALLEGED WAS THE INFORMANT AND ACTUAL SUPPLIER OF THE CONTRABAND AND HAD PREVIOUSLY CAUSED SIMILAR CHARGES TO BE BROUGHT AGAINST THE DEFENDANT IN ANOTHER JURISDICTION?
 - (e) THE SAME JUDGED TRIED ORIGINAL AND A SECOND TRIAL OF THE SAME OFFENSE
 - (f) POST ARREST AND INDICTMENT STATEMENTS WERE INTRODUCED AGAINST DEFENDANT

TABLE OF CASES

	Pages
Aquilar v. Texas, 378 US 108 (1964)	19
Black v. Sheraton Corp. of America 47 F.R.D. 263 (D.C.D.C. 1969)	14
Chimel v. California 395 U.S. 752 (1969) .	21
Draper v. US 358 US 307 (1959)	19
Hernandez v. Nelson 298 F. Supp. 682 (1968)	16
Katz v. US 389 US 347 (1967)	21
Roviaro v. U.S. 353 US 53 (1957)	11, 13 .
Spinelli v. US 393 US 410 (1969)	20
U.S. v. Bryan 393 Fed. 2d 90 (1968)	24
U.S. v. Hernandez 282 F. Supp 272 (1968) .	20

OTHER AUTHORITIES

Searches & Seizures, William E. Ringel 1972 Clark Boardman - Page 432	18
--	----

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction from the U.S. District Court for the Southern District of New York.

Appellant was found guilty after trial of possession of Heroin with intent to distribute in violation of 21 USC 841 (a) 1, (b).

The appellant was originally tried before the Honorable Richard T. Owens, and represented by Roland Thau, Esq. of The Legal Aid Society. The original trial resulted in a hung jury.

Appellant was retried before Judge Owens and represented at his second trial by Larry Kessler, Esq. Appellant was found guilty at his second trial and sentenced on the 18th of August, 1975 to twelve (12) years imprisonment to be followed by three (3) years special parole.

This appeal is from this judgment.

STATEMENT OF FACTS

HISTORY ARREST

Appellant was initially arrested at Port Authority Bus Terminal in New York City in the company of his common law wife, CHRISTINE SUMMERS while waiting in line to purchase a ticket. At the time of their arrest, they were in the possession of a suitcase which was taken to taskforce headquarters and later searched without a warrant (Document 26, pages 30, 31, 301) hereinafter referred to as (D26,p30,31,301)

TIP

Government agents had received a tip from an informant that appellant and his wife would have in their possession, a quantity of a controlled substance and that there was about two ounces of heroin that would take a ten cut. (D26,p.80,82)

SURVEILLANCE

This tip was given to the government agents some time prior to the arrest. The agents thereupon set up a surveillance of the bus terminal and when appellant and his wife arrived, immediately placed them under arrest. (D26, p52)

INITIAL SEARCH

After their arrest, appellant and his wife were taken outside of the bus terminal and in the presence of other agents were both personally frisked and searched and no controlled substance was discovered. The suitcase was taken from appellant by the arresting officers.

SUBSEQUENT SEARCH

Appellant was then taken to one of the task force at 201 Varich Street offices by the arresting officers where the suitcase was searched and a quantity of narcotics was allegedly discovered.

CHARGE

Appellant was indicted in the Federal District Court for the Southern District of New York for illegal possession with intent to distribute a controlled substance in violation of 21 USC 812,841 (a)1,(b).

COUNSEL

Appellant was represented at his first trial by ROLAND THAU, Esq. of the Legal Aid Society. Appellant's initial trial resulted in a hung jury.

PRE-TRIAL

A motion to suppress was held prior to appellant's first trial. Counsel sought to obtain the identity of the

informant on the grounds that the identity was essential to determine reliability and the defendant's ability to prepare his defense and to consequent probable cause for arresting appellant. Defendant contended that the seizure was illegal on the grounds that there was no possible cause for the arrest and that the search conducted was violative of the Fourth Amendment. Counsel further sought to obtain a list of cases wherein the informant had previously supplied tips to the government in order to determine whether in fact the informant was actually reliable.

These motions were denied.

Appellant proceeded to trial and the jury failed to agree on a verdict.

SECOND TRIAL

Appellant's second trial was scheduled before the same judge and newly appointed counsel, LAWRENCE KESSLER, Esq., was assigned two weeks prior to trial (D.26 p.224)

Between the time of the first trial and the second, appellant was rearrested and held without bail because of a warrant of arrest issued in Virginia as a result of a tip supplied by the same informant who tip on

on appellant in the instant case.

Appellant's wife and companion at his initial arrest was subsequently released. At the time she was pregnant with appellant's child and subsequently became ill and died. (D.26 p.203) Appellant's trial began on the day his wife was buried. (D.26 p.223) Appellant was then very distraught and overcome by grief. Appellant's wife had been in the hospital for a period of time prior to her death, and appellant then incarcerated, was not allowed permission to visit her. (D.26,p.370)

Because of the loss of his wife and unborn child, (D.25, p.110) and the pressures of the past and pending trial, appellant was emotionally grief-stricken.

(D.26,p.223,370,371,372) His attorney at that time had only been recently appointed. Counsel and appellant had difficulty in coordinating and cooperating in the appellant's defense. (D.26,p.2,226,367)

The court denied appellant's request for a postponement of trial (D.26,p.227)

MOTION FOR SUPPRESSION

Appellant's counsel filed (D.17,p.1-6) a motion suppressing all tangible property seized from the defendant at the time of his arrest and requiring the government to make SARAH ROBERTS AND RONNIE EVANS available and identified

as informants on the grounds that these persons had played vital role in the crime and if they are the informants then their identification and testimony is necessary for a fair trial.

Throughout his trial, appellant requested that his previous wife, SARAH ROBERTS and or her husband RONNIE EVANS was or were informant(s) and that he wanted her (they) to be called as a hostile witness(es) because he alleged that she had maliciously tried to frame him previously by making a false report on him in Virginia and causing his arrest in that jurisdiction. (D.26,p.82,83, 84,361)

That arrest was issued in the state of Virginia, on information supplied by the same informant but was subsequently nolle prosequi. D.26,p.84,85,86,87,88.

RELATION WITH COUNSEL

Appellant also implored assigned counsel to call said SARAH ROBERTS as a witness because she dealt in drugs (D.26,p.167,168) and he believed that she was the informant. (D.26,p.284,285,286,287) Appellant alleged further that she was in fact the person who had supplied any contraband found in the suitcase because she was present when the suit case was packed and he believed that she actually place the narcotics in the suitcase and then called

in a "tip". (D.26,p.369,370,371)

TRUE IDENTITY

Whether in fact the appellant's contention as to the true identity of the informant is correct or not, is, of course, available to this appellant term through the sealed part of the record.

Counsel prior to the second trial sought the identity of the informant based upon the fact that if in fact (SARAH ROBERTS) was the informant then she supplied the contraband. Appellant would have a defense under the creative activity theory (D.25,ps.3-6)

BODY RECORDING

Between the time of first trial and his second trial, appellant was released on bail. During appellant's second trial, undercover agent, JEROME CHRISTIAN testified that a tape recording made by him was alleged to have recorded appellant's conversation with other about appellant's previous trial and the narcotics involved in the initial arrest. D.26,ps.-129-179.

TRIAL STRATEGY

At this second trial, appellant's counsel consistently tried to show that the informant was in fact appellant's second wife, CHRISTINE SUMMERS. D.26,p.281,282.

Because she was deceased at that time, there was no way in which anyone other than appellant could rebut this contention.

Nevertheless, appellant consistently contended that his second wife, CHRISTINE SUMMERS was not the person, and that the narcotics found were not hers, nor did she in fact know anything at all about them. D.26,p.370.

Due to appellant's insistence, counsel subpoenaed appellant's first wife, SARAH ROBERTS and after interviewing her failed to call her as a witness despite appellant repeated contentions that she was the informant and had supplied the contraband. D.26,p.284-286,319.

Ostensibly, the reason for counsel's failure to call this witness was because when he interviewed her and she stated that she was not the informant and did not want to testify, and would have made negative statements about appellant because she did not want her present husband to know that she was still seeing appellant.

Trial counsel LAWRENCE KESSLER concluded that SARAH ROBERTS was not the informant and advised appellant that he should not call said SARAH ROBERTS as a witness. D.26,p.374,379.

MOTION FOR NEW TRIAL

After the second trial, trial counsel submitted

a motion for a new trial (D.18,ps.1-3) and indicated that he had interviewed said SARAH ROBERTS prior to trial, and that she had been in the apartment when the suitcase had been packed. (D.26,p.370) She had indicated that she had been sentenced at the time of appellant's arrest. D.26,p.320. She also indicated that she had not informed upon appellant nor had she given information to anyone else who did.

AGENTS MISREPRESENTATION

Later it was discovered that counsel had been mislead by a false statement made by Detective Balmer in reference to the informant which was later shown to be untrue, but which convince trial counsel that appellant's version of the fact was not provable.

Detective Balmer testified that the informant was one who had been arrested and charged with possession and sale of narcotics and who had not been yet sentenced on that charge (D.26,p.111) 320

The government agent Detective Balmer swore that the informant had not been sentenced on April 30, 1974. SARAH ROBERTS indicated that she had been sentenced to probation prior to April 30, 1974.

Consequently, counsel concluded that SARAH ROBERTS was not the informant, however it may well

have been that SARAH ROBERT'S husband, RONNIE EVANS was in fact the informant and had not been sentenced but had induced SARAH ROBERTS to help set up appellant for a drug bust credit.

Appellant during his counsel conclusion lost his self control and because he disagreed with his counsel imputation of his dead wife CHRISTINE SUMMERS, exited himself from his trial (d.26,p.367,370,371, which can reasonably be assumed had a negative impact on the jury.

Appellant was sentenced by the Honorable Richard Owens to twelve (12) years imprisonment.

ARGUMENT

POINT I

REQUIREMENT FOR DISCLOSURE OF
INFORMANT'S IDENTITY

A. The substance of this crime is possession of a controlled substance. The defendant does not have a basic constitutional right to require the government to disclose the identity of an informant.

However, in certain factual patterns, the identity of the informant is allowed where such identity is substantively critical to the defendant's right to prepare his defense.

Defendant's defense in this case was substantially based upon the fact that the informant was in fact his first wife, SARAH ROBERTS, or her husband alter ego, RONNIE EVANS and that appellant was "set up" by the informant in this case. Defendant contends that said informant was in fact a government agent and actually supplied the drugs in this case. Further, that since said drugs were supplied by or through a government agent, that defendant is not in fact guilty even though he may have had a predisposition to commit the crime.

For the purpose of this appeal, it is contended that consequently the informant's identity was essential to defendant's right to a fair trial, and the government's privilege to withhold disclosure should have been denied. Roviaro v. U.S. 353 US 53 (1957).

Knowledge as to who the informant was in this case, cannot be underestimated. Such knowledge is essential to defendant's right to fairly meet the accusation of the alleged crime.

If the informant was SARAH ROBERTS or her alter ego as is the contention of appellant, then there was substantial merit to appellant's claim that the contraband was supplied by the informant and consequently/the government.

Assuming that if the informant was SARAH ROBERTS, and or her husband RONNIE EVANS and if that fact would have been brought to light at trial, then appellant's defense that the contraband was supplied by SARAH ROBERTS was highly pertinent. Because if SARAH ROBERTS and or RONNIE EVANS were in fact agents of the government at that time then appellant was entitled to fully explore this fact during trial. When the identity of the informant effects substantive defense on the merits of the case, such as in the instant facts, then the government's privilege to withhold the name of the informant

gives way to other constitutional considerations.

B. Although there appears to be no case law on this point, there would appear to be an alternative duty in the fact pattern of the present case for the government to show that the informant was not SARAH ROBERTS or her husband RONNIE EVANS. While each case would depend on its own merits and factual pattern, in the instant case, where appellant is contending or has reasonable grounds to believe that he has been "set up" or "framed" by a paid agent or cooperative government informant. A duty to provide negative disclosure should exist in this case when appellant contended that informant was his ex-wife that she was jealous of his present wife. That she had tried to set him up before on a charge which was dismissed and finally she was the one who supplied the contraband, then the government ought at least have the burden in the interest of justice, fair play and due process considerations to be required to state that the informant was not either of those persons whom appellant identified as the source.

Negative disclosure is a reasonable requirement since it would allow the government to maintain the true informant's anonymity in the interest of future use and for his or her own personal safety.

The government's memorandum of law on the Disclosure of the informant, indicated that Roviaro v. U.S. 353 US 53, (1957) is controlling on the issue of disclosure. In that case it was held that "No fixed rule with respect to disclosure is justified. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case taking into condiseration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

However, in its brief, the government advocated that the informant must be disclosed only when such identity is essential to defendant's case. For example, an informant may be present during a criminal transaction and then his identity would be required to be disclosed. In this case, the nature of the crime is possession. To require the informant to be present during the "act" is clearly inappropriate.

Appellant's need for learning the identity of the informant meets all requirements of relevant, helpful, and essential to a fair determination of the case..

Absent the identity of the informant in this case, the truth was not presented to the jury and the trial

was one based upon secrecy and cover up sans any showing by the government that such secrecy was even necessary. Such practices offer momentus possibilities for abuse. This trial without disclosure, made this a trial without truth and therefore a travesty of justice. Such a trial merits reversal!

C. The government need not disclose an informant's identity unless the informant played an integral role in the illegal activity charged to the defendant; or the informant's identity has already been revealed to the defendant; or the court in an exercise of judicial discretion decides that disclosure is vital to a fair determination of the issues. The informer's privilege does not run to the benefit of the individual, but rather it is the government's privilege to protect sources of information and individual who assist it. The basis of the privilege is that citizens will not volunteer information concerning crimes unless some protection is afforded them. Black v. Sheraton Corp of America, 47 F.R.D. 263 (D.C.D.C. 1969).

The trial court by failing to reveal the informer's identity or allowing defense counsel to question said informer closed the door on material issues which relate to the informer's credibility and the quality of the tip:

- 1) How did the informer obtain his/her information?
 - a) Did the informant witness Edmonds purchase the drugs?
 - b) Did he/she see Edmonds pack the drugs in the valise?
 - c) Did the informant obtain the information through hearsay?
 - d) Did said informant plant the drugs in Edmonds' suitcase?

According to the Aguilar test, an informant's tip must pass a two pronged test; i.e., the tip itself must be specific and the source reliable. With none of the above issues answered, it is difficult to ascertain whether the source is credible.

Further, before the informant's privilege is allowed to attach the informant's status must be ascertained. The basis of the privilege is to protect citizens from reprisals of the party injured due to the communication. However, principles of fundamental fairness require that if the informant is a paid government agent, the accused should have the opportunity to confront and question the veracity of his information. A paid government agent should not be afforded citizen status neither does the rule of privilege anticipate the protection of a

government officer communicating to another government officer. The failure to allow defense counsel to confront the informant vitiates a line of material questioning which is vital and important to the defense of the defendant.

The identity of the informer who is a material witness on the issue of guilt must be disclosed to the defendant. Hernandez v. Nelson, 298 F. Supp. 682 affirmed 411 F.2d 619 (D.C. Cal. 1968). Even if the court refused the disclosure of the informant's identity to the defendant an in camera disclosure was appropriate. Upon such examination by the court without counsel as to the informant's status, it was determined that disclosure was warranted then the identity should have been revealed to the defendant. Hernandez v. Nelson, supra.

Where the defendant's guilt or innocence hinges upon the quality and veracity of the informant's information, said informant's identity must be revealed to him.

POINT II

INFORMANT'S RELIABILITY AND PROBABLE CAUSE

Appellant was arrested on the basis of an allegedly reliable informant's tip.

The acts and circumstances surrounding the arrest of Appellant, were such that there was not probable cause or suspicious actions in the conduct of either the Appellant or his wife and companion, Christine Summers, at the time of their arrest.

The testimony of Detective, HORACE BALMER, indicated that appellant was placed under arrest immediately upon entering the bus terminal. The arrest was allegedly based upon probable cause, the result of a theoretically reliable informant's tip.

Prior to trial, counsel extensively attempted to discover the identity as well as to explore the reliability of the informant.

Counsel requested a list of cases and/or citations resulting in convictions wherein this same informant had been the source of the arresting information.

Such information was necessary to determine if in fact "probable cause" existed based upon actual reliability.

Reliability is not something which arises simply by an officer stating that some unknown informant is reliable.

Reliability is a fact and a fact that must be determine from past events.

These facts were exclusively available to the government. They were not available to appellant's counsel. When counsel requested this information, he was seeking an alternative way of testing the informant reliability without discovering or requiring disclosure of the informant's identity.

Defendant's attempted discovery may have inadvertently exposed the identity of the informant. This is not known nor could it have been determined at that time. However, counsel simply requested information sufficient to "test" the reliability of the informant.

"Where the record discloses no probable cause to arrest without a warrant except for information conveyed by an informer, disclosure of his identity will be required. Otherwise, probable cause may be established on the acceptance of a police officer's testimony that he obtained a communication from a reliable unnamed informer. Failure to produce an informer would deprive the defendant of any opportunity to rebut the police officer's crucial testimony. The defendant in such a situation, would be unable to prove that the informant did not in fact exist, or that if he did exist, the police knew him to be unreliable, or that the information he gave to the police was different from that testified to."

SEARCHES & SEIZURES, William E. Ringel,
1972 Clark Boardman-Page 432

Here, there was no showing of reliability. Absent such reliability there is no probable cause for the arrest.

The government in its memorandum submitted to the lower court indicated that there existed independent verification. Independent verification or corroboration is required where there are no details sufficient to warrant the conclusion that informant is a credible person. Aquilar v. Texas 378 US 108 (1964).

Here the only tip reliably supplied by the informant was that appellant and a woman would be arriving at Port Authority Bus Terminal on the evening of May 1, and that they would be going to Virginia. The tip apparently also said that they would be in the possessing of narcotics.

The fact that appellant did in fact show up at the terminal that evening is not such independent corroboration as to create probable cause when none existed, Draper v. US 358 US 307, (1959).

The fact that appellant had been previously arrested in Norfolk, Virginia on narcotics charges as the result of information previously supplied by this informant serves only to give credence to appellant's claim that the informant was trying to set him up.

Without establishing the identity of the informant, the reliability of said unknown person is totally challenge-

able by the word of the government to disclose its prior cases particularly in view of the fact that the testimony of the government agent which was designed to show that the informant was reliable was vague, unclear, and indefinite.

Spinelli v. US 393 US 410 (1969).

Appellant claims that he was "set up" by the informant once before. That "set up" does not make the present one more valid.

Federal criminal procedure requires a reliable informant. No showing was made that the one in this case was reliable. Absent such reliability there failed to exist probable cause for the arrest. U.S. v. Hernandez 282 F Supp 272 (1968)

POINT III

ARREST FOLLOWED BY SEIZURE OF SUITCASE AND SUBSEQUENT SEARCH THEREOF WITHOUT A WARRANT

When an arrest is lawful, a contemporaneous search of those articles and the area under the immediate control of the defendant is permissible.

However, the mere arrest of a person does not give the government the right to search everything or anything belonging to the defendant without a warrant. *Katz v. US* 389 US 347 (1967)

In allowing incidental and or subsequent searches of a persons' property, the court have indicated that searches may be made for only special reasons; i.e., for weapons to protect the safety of officers. It has been held that impounded vehicles may be searched when there is a chance of the vehicle being removed, or when it has been seized for forfeiture. Chimel v. California, 395 U.S. 752 (1969).

Appellant contends that there was no probable cause for his arrest and that all subsequent searches and seizures are illegal. However, assuming that there was probable cause and the arrest was lawful there is no justification for the subsequent search of appellant's suitcase, appellant was in police custody. The suitcase was also in custody and not under appellant's control. The suitcase was

not forfeited or escheating to the government. It was not mobile like an automobile. It was not going anywhere. The duty of the arresting officers at that point was to place the suitcase in a custodial place to insure it's safe-keeping.

If there were reasonable grounds for believing that there was contraband therein, then at that time, it was for a judge to decide whether the defendant's property warranted further search. Merely being arrested does not eradicate a citizen's right to the protection of the Fourth Amendment.

"The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by Oath, or Affirmation, and particularly describing the place to be searched and the perons or things to be seized".

Absent exigent circumstances, the officers should have then applied to a judicial officer under oath indicating their reason for believing that probable cause existed for searching the defendant's suitcase and belongings.

While this may be an administrative burden, the failure to prohibit arresting officers from conducting extensive and unnecessary searches will eventually allow an arrest for one crime to become a ruse or justification for

searching ones personal belongings for evidence of another crime.

Here there were no time pressures, no danger of a weapon or harm to an officer, no risk of loss of evidence, no justification for a warrantless search of private matter.

Absent such justification or circumstances such a search without a warrant is violative of the spirit of the Fourth as well as the Fifth Amendments to the United States Constitution.

POINT IV

APPELLANT'S SECOND TRIAL SHOULD
HAVE BEEN ASSIGNED TO A NEW
TRIAL JUDGE

According to the holding of U.S. v. Bryan, 393 Fed. 2d 90 (1968) it was held that in a multi-judge district, where the necessity of retrial before the same judge is not present, that a lengthy criminal case be retried before a different judge unless all parties request that the same judge retry the case.

Both the first and second trial of this case were held before the same judge. While the issues in this case was not highly complex, the first trial was sufficiently antagonizing and difficult in terms of the facts and appellant's attempt to represent himself to place the trial judge in a subconscious biased attitude toward appellant.

The purpose and intention of the holding in U.S.v. Bryan, supra is to transfer a second trial to another judge so that there is a immunization of taint carried over to a second trial.

Appellant asked for more time to prepare his newly assigned counsel, the judge denied this.

Appellant indicated that he was mentally not fit to proceed to trial because of the pressures of the loss of his

family and the other pending cases. This to was denied.

The judge denied requests for disclosure of the informant's identity.

The subsequent conviction as a result of testimony of post indictment statements made by appellant and appellants self exit from the trial coupled with the unusually harsh sentence imposed, indicates that the judge may not have been totally free from bias toward appellant and his case.

When a defendant repeatedly professes innocence and alleges that he has been "set up" by paid government informants and these factors are not fully explored at trial then it is incumbent upon the trial judge to refer the case to a new judge. The totality of justice and fair play require this when it is not an undue administrative burden on the courts.

In this district, with the large number of judges available, it constitutes a reversable error which this court may correct by referring this case back for a new trial with a new trial judge.

POINT V

TRIAL IN ITS TOTALITY AMOUNTED
TO A DENIAL OF DUE PROCESS

Appellant was denied knowledge as to the identity of the informant. When the informant was alleged to have had the supplier of the contraband.

Appellant was mentally unprepared for trial.

Appellant, at the time of his second trial was emotionally distraught and grief-stricken over the recent death of his wife and unborn child.

While there is no medical testimony of appellant's medical or mental condition, this court ought to take judicial notice of the fact that when one's wife has been arrested at the same time and is pregnant and then dies and is buried on the same day as one is being tried on a severe criminal charge and one is not allowed to visit his dying wife prior to her demise, that such factors create a strained mental condition and results in severe emotional stresses.

Appellant was not assigned counsel in sufficient time to prepare for trial.

Trial counsel had at the time of trial only conversed on two brief occasions with appellant. He and appellant disagreed on what witnesses ought to be

called and on the whole approach to the defense of this case.

Trial commenced and counsel failed to call the witness SARAH ROBERTS whom appellant said he believed to be the informant and who was the person appellant claimed to have supplied the found drugs.

Counsel proceeded to trial believing that the drugs were supplied by appellant's wife the then deceased CHRISTINE SUMMERS.

Appellant objected, but his mental condition was such that he acquiesced to his lawyer's advice.

Counsel failed to call SARAH ROBERTS only to later discover that he had been mislead by government agents.

Failure to call this witness and/or her paramour was key to appellant's case.

Counsel tried to impute either ownership, supply or control of the drugs to CHRISTINE SUMMERS, the wife and companion of appellant at the time of his arrest. Counsel further tried to show that CHRISTINE SUMMERS was the informant.

Promoting these theories served only to promote the guilt of appellant in the minds of the jury.

If appellant's wife and companion CHRISTINE SUMMERS was the informant then whose drugs would they be?

If appellant's wife and companion CHRISTINE SUMMERS supplied the drugs and they were taking a trip together would not appellant be guilty of possession at the time of his arrest?

Trial counsel's theory defense was actually detrimental to appellant's interest.

During appellant's trial, the undercover agent JEROME CHRISTINA introduced statement allegedly made by appellant concerning his first trial.

These statement were inflammatory and prejudicial and of questionable propriety.

During summation, appellant's mental depression and anguish coupled with his intense disagreement with his defense exited himself from the trial. This certainly had a negative effect on the jury and was self defecting.

While perhaps none of these factors taken alone may amount to a denial of a fair trial and due process but their cumulative effects coupled with the severe sentence imposed result in a total net unjust result, sans process.

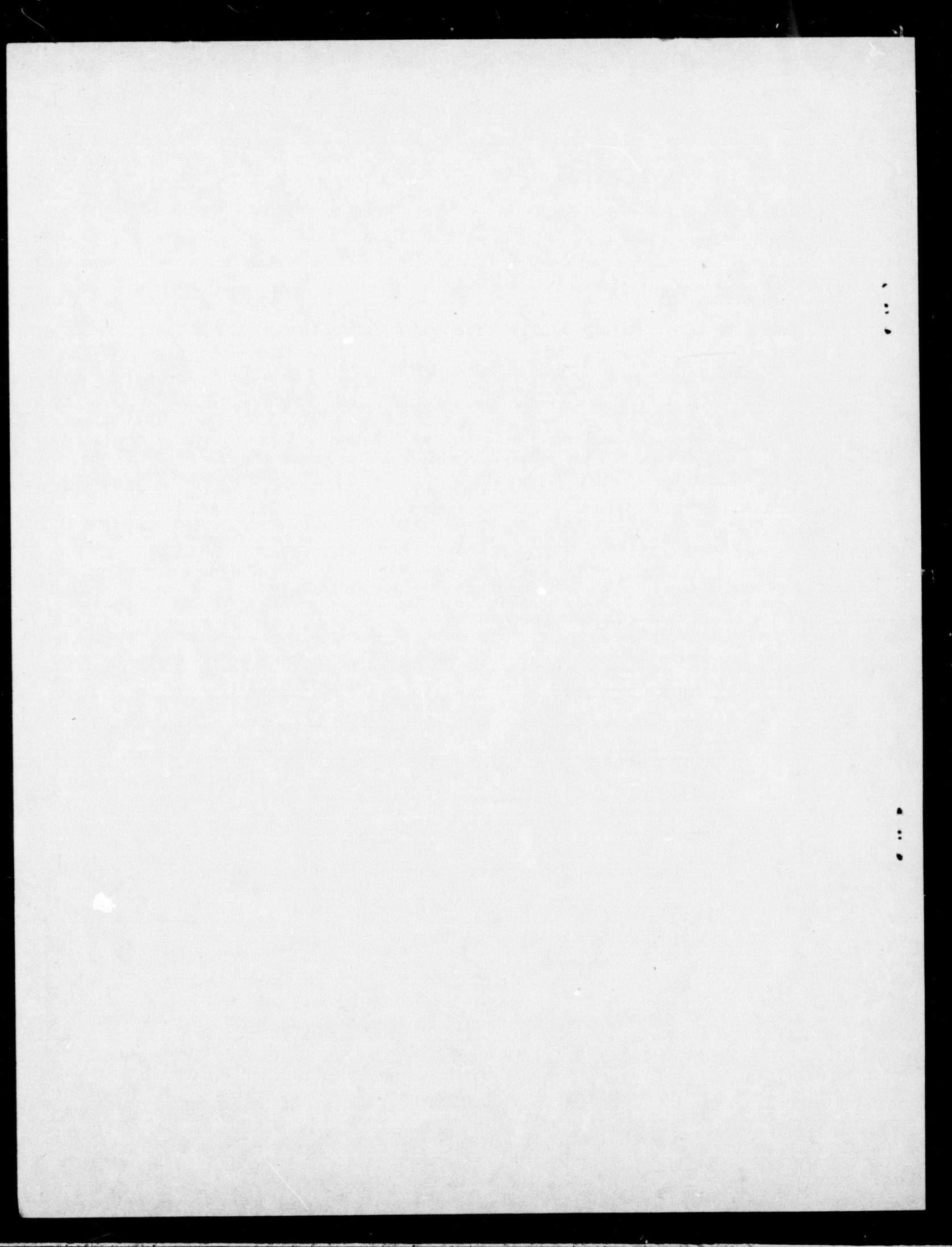
Appellant is entitled to have the jury hear the true facts.

CONCLUSION

For the above-stated reasons, the judgment
should be reversed and the indictment dismissed and a new
trial granted.

Respectfully submitted,

W. KIRKLAND TAYLOR, Esq.
Attorney for Appellant
35 West 125th Street
New York, New York 10027
Tel. 212-860-9292



REV 6 1975
THOMAS J. CAHILL
ATTORNEY
SAC DIST. OF N.M.

